

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4641 of 1987

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH

- =====
1. Whether Reporters of Local Papers may be allowed : NO
to see the judgements?
2. To be referred to the Reporter or not? : NO
3. Whether Their Lordships wish to see the fair copy : NO
of the judgement?
4. Whether this case involves a substantial question : NO
of law as to the interpretation of the Constitution
of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge? : NO

CHANDRAKANT MADHAVJI SHAH

Versus

STATE OF GUJARAT

Appearance:

MR PJ PATEL for Petitioner
Ms MANISHA LAVKUMAR, AGP i/b M/S PATEL ADVOCATES
for Respondent No. 1
RULE SERVED for Respondent No. 2, 3

CORAM : MR.JUSTICE M.S.SHAH

Date of decision: 10/08/1999

ORAL JUDGEMENT

This petition under Article 226 of the Constitution is filed by a Deputy Executive Engineer who was prematurely retired from service in public interest in exercise of the powers under clause (aa)(i)(1) of Rule 161(1) of the Bombay Civil Services Rules as per the order dated 28.4.1987 (Annexure "A" to the petition).

2. The petitioner joined the Government service as an Overseer in the year 1956. He was promoted as a Deputy Executive Engineer by order dated 28.12.1978. The petitioner was served with adverse remarks for certain years particularly for the following periods :-

1.4.1980 to 12.11.1980
1.4.1981 to 31.3.1982
1.4.1983 to 31.3.1984
1.4.1984 to 5.7.1984
1.4.1985 to 16.8.1985 and
17.8.1985 to 31.3.1996

3. The learned counsel for the petitioner has challenged the order of compulsory retirement mainly on the following two grounds :-

- (i) On the date of the petitioner's retirement, there were pending departmental inquiries. The authorities could not have passed the impugned order without completing the inquiries and finding the petitioner guilty of the charges levelled against the petitioner. Since the order of compulsory retirement was passed during pendency of the inquiries, the order was illegal.
- (ii) Even if the Government had the power to compulsorily retire the petitioner from service during pendency of the departmental inquiries, the following terms in the impugned order vitiated the order and on that ground the order is required to be struck down as illegal :-

"The pending enquiries shall however be continued against him (the petitioner) even after his retirement"

In support of the aforesaid contentions, strong reliance is placed on the decisions of this Court in Narendrakumar V. Parikh vs. State of Gujarat, 1999 (1) GLH 816, J.M. Mehta vs. State of Gujarat, 1991(1) GLH 361 and also on the decision of a Division Bench of this Court in Special Civil Application No. 28/90 decided on 12.10.1990.

4. On the other hand, Ms Manisha Lavkumar, learned AGP has vehemently opposed the petition and has submitted that there is no bar against prematurely retiring a Government servant during pendency of the departmental inquiries. It is submitted that the power can be

exercised in public interest and, therefore, the Government was justified in relying upon the record which was then available with the Government including the Confidential Reports, the remarks made in the Confidential Reports about doubtful integrity of the petitioner and also the charges levelled against the petitioner in those pending departmental inquiries and four contemplated departmental enquiries.

It is further submitted in the alternative that in any view of the matter while deciding the petition today, the Court would also look at the fact that the petitioner has been found to be guilty of several acts of misconduct at many aforesaid inquiries and that in four different inquiries out of the six departmental inquiries the petitioner has not only been found to be guilty but the Government has also accepted the reports of the Inquiry Officers and imposed penalty of withholding/deducting a part of the petitioner's pension. It is, therefore, submitted that in exercise of the extraordinary jurisdiction of this Court under Article 226 of the Constitution, the Court would not ignore that material and the Court would not confine the examination of all the challenges to the impugned order as if the impugned order was being examined in 1987. The learned AGP submitted that the developments during pendency of the petition cannot be ignored as the same have a direct and immediate bearing on the subject matter of the petition. The learned counsel also placed reliance on the decision of this Court in 1995(1) SCC 336 and M.S. Modi vs. G.S.R.T. Corporation, 1997(2) GLR 1421, and AIR 1998 SC 1661.

5. As regards the contention that the Government could not have passed the impugned order of compulsory retirement during pendency of the departmental inquiries, the learned counsel has placed strong reliance on particular reference to the decision of this Court in Narendrakumar V. Parikh vs. State of Gujarat, 1999 (1) GLH 816 where the Court formulated the following questions :-

"Now the question comes as to what would be the effect of the pendency of the Departmental Inquiry at the time when the order of compulsory retirement was passed and of the fact that in the body of the impugned order itself it was mentioned that the pending inquiry shall continue against the petitioner. Whether the impugned order of compulsory retirement is rendered punitive and stigmatic on these two grounds is

the moot question for the consideration of the validity of the present impugned order dt. 19-6-91."

The learned counsel for the petitioner, submitted that the same question arises in the present petition also and, therefore, the matter is squarely covered by the aforesaid decision.

6. Though *prima facie* attractive, the contention cannot be accepted because the question formulated by the Court in the above decision was examined in the context of facts of that case. After formulating the above question, the learned Judge made the following observations in para 12 of the judgement :-

"It is also not in dispute that even up-til now no further inquiry proceedings have been held and the explanation, which has been given for not holding the inquiry, is far from convincing. It is, therefore, clear that the inquiry proceedings were short circuited and the charges, which were subject matter of the inquiry, were made use of by the Committee, which considered the petitioner's case for compulsory retirement and it cannot be said that these charges did not weigh with the Committee in arriving at the recommendations for his compulsory retirement....."

The above judgment was rendered on 18.1.1999 and the Court observed that "in the facts of the present case also it is very clear that not only that the inquiry was pending, the Committee, while considering the case of compulsory retirement in May 1989, in fact has taken into consideration the charges, which formed the subject matter of inquiry and which were yet to be inquired upon. Thus the unproved charges have been taken into consideration for the purpose of taking the action of compulsory retirement". It is thus clear that what weighed with the Court was that the Government cannot use the pending departmental inquiries as a ground for compulsorily retiring the petitioner from service and thereafter not pursue the inquiries. The factual background in which the aforesaid decision was rendered is not available in the present case as admittedly the departmental inquiries which were pending on the date of compulsory retirement have been concluded and in as many as four different inquiries the petitioner has been found guilty of serious acts of misconduct and the impugned orders have been passed withholding/reducing the amount

of the petitioner's pension for the purposes stipulated in the revised orders of penalty.

In the case of State of U.P. vs. Abhai Kishore Masta, (1995) 1 SCC 336, the Apex Court has held in no uncertain terms that merely because the order of compulsory retirement is passed during pendency of departmental inquiry, it should not necessarily mean that it is an order penal in nature or that it should be deemed to be an order penal in nature.

In view of the facts and circumstances of the case, it is, therefore, not possible to accept the petitioner's contention that the order of compulsory retirement was passed to short circuit the pending departmental inquiries. The very fact that the departmental inquiries were concluded as stated above, clearly indicates the aforesaid assertion.

7. Similarly, as regards the decision of the Apex Court in High Court of Punjab & Haryana vs. Ishwar Chand Jain, AIR 1999 SC 1677, there also the principle laid down is that the employer cannot pass a short circuit order to remove the employees from service when the order of retirement was based on the allegations of misconduct which are subject matter of pending inquiry. It is clear from the facts stated in the judgment that the inquiry was still pending when the matter was examined by the Apex Court. The different considerations would arise if the inquiries pending on the date of the order of premature retirement were not concluded till today or if the petitioner had been exonerated in all those inquiries by now.

8. As far as the decision of the Division Bench of this Court in Special Civil Application No. 28/90 is concerned, there is no dispute about the principles laid down therein that the form of the order is merely a camouflage for an order of dismissal for misconduct and that it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order and if the Court holds that the order though in the form is merely a determination of employment is in reality a cloak for an order of punishment, the Court would not be debarred merely because of the form of the order, in giving effect to the rights conferred by law upon the employees. In the facts of that case, the Court found that after the adverse remarks in question, the petitioner in that case was not only allowed to cross efficiency bar but he was also promoted to the post of Executive Engineer and,

therefore, the Court found the contention of the petitioner that he was not "dead wood" to be sound and the Court further found that the impugned order mentioned that some inquiries were pending against the petitioner. From the facts stated in the judgment, it appears that the inquiries were not carried to their logical conclusion and no finding of guilt was recorded against the employee. The Court, therefore, found that the order of compulsory retirement was passed to short circuit the departmental inquiry against the petitioner and that the charge levelled against the petitioner was not shown to have been proved. As stated above, the facts in the instant case are quite different and the entire matter assumes a different complexion after completion of the departmental inquiries.

9. The next contention of the learned counsel for the petitioner is that even if the Government had the power of passing the order of compulsory retirement during pendency of the departmental inquiries, the fact that the impugned order makes a reference to the pending departmental inquiries in clause 3 of the order quoted hereinabove, the order casts stigma on the petition and, therefore, also the impugned order is illegal and void ab-initio. Here again, this question might have been required to be examined if the petitioner was exonerated at the departmental inquiries or if the inquiries were not concluded, but in the facts of the present case since the departmental inquiries have already been concluded and the petitioner has already been found to be guilty of serious acts of misconduct in as many as four departmental inquiries, the Court does not think it to be a fit case where the discretionary and extraordinary jurisdiction of this Court under Article 226 of the Constitution should be exercised to interfere with the impugned order only on the ground that the impugned order makes a reference to the pending departmental inquiries.

10. The brief details of the charges levelled against the petitioner in those inquiries, and the final outcome of those inquiries have been produced at the hearing of this petition. So also the adverse remarks in the petitioner's confidential reports for the period between 1980 and 1986 have been set out in a statement produced at the hearing of this petition. The said material would fully justify the impugned decision to retire the petitioner prematurely.

11. In view of the above discussion, the petition is dismissed.

12. It is clarified that the observations made in this judgment are for the limited purpose of examining the petitioner's challenge to the order of compulsory retirement and that the Court has not gone into the correctness or otherwise of the findings at the departmental inquiries in question and the legality and validity of the orders of penalty passed therein, as the Court is informed that the petitioner has already filed petitions challenging the said orders of penalty.

(M.S. Shah, J.)